Supreme Court, U.S.
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No. 95-

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1995

PLANNING RESEARCH CORPORATION INC.

Petitioner,

v.

UNITED STATES, *ex rel.* MERVYN A. SCHWEDT,
pursuant to 31 U.S.C. §§ 3729-3733, *QUI TAM* RELATOR,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a contractor's progress reports submitted to the government, which neither include nor accompany a request for payment, constitute "claims" under the civil False Claims Act, 31 U.S.C. § 3729, and whether the D.C. Circuit's decision to this effect is in irreconcilable conflict with the definition of a "claim" set forth in the Act and established by this Court in *United States v. McNinch,* 356 U.S. 595 (1958), and *United States v. Neifert-White Co.,* 390 U.S. 228 (1967), and by other federal appellate courts.

2. Whether a contractor's delivery to the government of products for which the contractor never requested payment constitutes a "claim" under the civil False Claims Act, 31 U.S.C. § 3729, and whether the D.C. Circuit's decision to this effect is fundamentally inconsistent with the definition of a "claim" set forth in the Act and established by this Court in *McNinch* and *Neifert-White,* and by other federal appellate courts.

3. Whether the D.C. Circuit's decision that the penalty provisions of the civil False Claims Act apply to statements in support of false claims is in irreconcilable conflict with the decision of this Court in *United States v. Bornstein,* 423 U.S. 303 (1976), and other federal appellate court precedent.

RULE 29.6 STATEMENT

Petitioner PRC is a wholly-owned subsidiary of Black & Decker Corporation. PRC Inc. is the sole owner of all of its subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

REPORT OF OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Summary of This Appeal 3

B. Background of This Litigation 6

C. The Decisions of the District Court and the Court of Appeals 8

REASONS FOR GRANTING THE WRIT 10

ARGUMENT 12

I. THE D.C. CIRCUIT'S DECISION THAT A "CLAIM" DOES NOT REQUIRE A REQUEST FOR MONEY OR PROPERTY, OR AN ACTION CAPABLE OF INDUCING THE GOVERNMENT IMMEDIATELY TO PART WITH MONEY OR PROPERTY, REQUIRES THE INTERVENTION OF THIS COURT 12

A. The D.C. Circuit's Decision Irreconcilably Conflicts With Supreme Court Precedent 12

B. The D.C. Circuit's Decision Conflicts With the Decisions of Other Federal Courts of Appeals 15

C. The Express Language of the FCA and Its Legislative History Establish the Requirement

of a Demand for Payment or Other Conduct Capable of Inducing the Government Immediately to Part with Money or Property 18

II. THE D.C. CIRCUIT'S RULING THAT STATEMENTS IN SUPPORT OF CLAIMS ARE SUBJECT TO THE FCA'S CIVIL PENALTIES IS IN IRRECONCILABLE CONFLICT WITH THE HOLDINGS OF THIS COURT AND THE OTHER FEDERAL COURTS OF APPEALS 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Blusal Meats, Inc. v. United States, 638 F. Supp. 824 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1007 (2d Cir. 1987) 18

Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355 (Fed. Cir. 1983) 16

Miller v. United States, 550 F.2d 17 (Ct. Cl. 1977) 22

Rainwater v. United States, 356 U.S. 590 (1958) 19,20

United States v. Bornstein, 423 U.S. 303 (1976) 10,22

United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973) 23

United States v. Ekelman & Associates, Inc., 532 F.2d 545 (6th Cir. 1976) 15

United States v. Gilliland, 312 U.S. 86 (1941) 20

United States v. Grannis, 172 F.2d 507 (4th Cir.), *cert. denied*, 337 U.S. 918 (1949) 23

United States v. Killough, 848 F.2d 1523 (11th Cir. 1988) 16

United States v. McNinch, 356 U.S. 595 (1958) ..... *passim*

United States v. Neifert-White Co., 390 U.S. 228 (1968) ..... *passim*

TABLE OF AUTHORITIES continued **Page**

United States v. Rivera, 55 F.3d 703 (1st Cir. 1995) 15,23

United States v. Rohleder, 157 F.2d 126 (3d Cir. 1946) 23

United States v. Tieger, 234 F.2d 589 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956) 16

United States v. Woodbury, 359 F.2d 370 (9th Cir. 1966) 22,23

STATUTES

18 U.S.C. § 80 (1926) 20

18 U.S.C. § 1001 (1994) 20

28 U.S.C. § 1254(1) (1988) 2

28 U.S.C. § 1291 (1988) 8

31 U.S.C. § 231 (1926) 20

31 U.S.C. § 231 (1934) 20

False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West 1983 & Supp. 1995) ..... *passim*

31 U.S.C.A. § 3729 (West Supp. 1995) 3,21

31 U.S.C.A. § 3729(a)(1) 18

31 U.S.C.A. § 3729(a)(2) 18

TABLE OF AUTHORITIES continued Page

31 U.S.C.A. § 3729(c) 18

31 U.S.C.A. § 3730 (West Supp. 1995) 5

Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 19

Act of Mar. 3, 1973, ch. 241, 17 Stat. 579 19

R.S. § 3490, Act of Mar. 2, 1877, § 3490, 18 Stat. § 691 19,20

R.S. § 5438, Act of Mar. 2, 1877, ch. 5, § 5438, 18 Stat. 1054 19,20

Act of June 18, 1934, ch. 587, 48 Stat. 996 20

Act of June 25, 1948, ch. 645, § 1001, 62 Stat. 683, 749 20

REGULATIONS

Federal Acquisition Regulation ("FAR") subpt. 9.4, 48 C.F.R. subpt. 9.4 (1994) 11

41 C.F.R. § 105-68.305(a)(3) (1995) 11

FAR § 1609.7001(c)(1), 48 C.F.R. § 1609.7001(c)(1) (1994) 11

OTHER AUTHORITIES

Fed. R. Civ. P. 9(b) 2,8

TABLE OF AUTHORITIES continued Page

Hearings on H.R. 5450 Before the House Comm. on Revision of the Laws, 78th Cong., 2d Sess. (1944), *reprinted in* 1948 U.S. Code Cong. Serv. Special Pamphlet 2661 19

S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5266 24

John T. Boese, *Civil False Claims & Qui Tam Actions* (Supp. 1995) 18

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PETITION FOR WRIT OF CERTIORARI

Petitioner PRC Inc. ("PRC") hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case. The D.C. Circuit's decision is reported as *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196 (D.C. Cir. 1995).

REPORT OF OPINIONS BELOW

The opinion by the United States Court of Appeals for the D.C. Circuit in this case is reproduced in the Appendices to this Petition at Appendix ("App.") A at 1a. The D.C.

Circuit's opinion affirmed in part and reversed in part the district court's decision dismissing the case, and remanded the case to the district court for further proceedings. App. at 10a.

The opinion by the United States District Court for the District of Columbia in this case, *United States ex rel. Schwedt v. Planning Research Corp.*, No. 92-1951-LFO, 1994 WL 118222 (D.D.C. Mar. 31, 1994), is reproduced in the Appendices to this Petition as App. B at 1b. In that opinion, the district court granted, in part, Petitioner's motion to dismiss pursuant to FED. R. CIV. P. 9(b) and also granted Petitioner's motion for summary judgment, dismissing the *qui tam* Relator Mervyn A. Schwedt's complaint in its entirety. App. at 10b.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the D.C. Circuit entered judgment in this case on July 7, 1995. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 7, 1995. The D.C. Circuit denied the Petition and Suggestion on August 28, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The federal statute involved in this case is the civil False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West 1983 & Supp. 1995) (hereinafter "FCA" or "the Act"). The FCA provides in pertinent part:

> **(a) Liability for Certain Acts.**—Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government

> or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .
>
> . . . .
>
> **(c) Claim Defined.**—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C.A. § 3729 (West Supp. 1995).

STATEMENT OF THE CASE

A. Summary of This Appeal

This case strikes at the essence of the relationship between the United States government and its contractors. At issue is the D.C. Circuit's ruling that, even absent a request or demand for payment, a government contractor's implicit goal of obtaining payment renders action taken by the contractor to perform its contract a "claim" under the civil

False Claims Act, 31 U.S.C. §§ 3729-3733, thereby subjecting the contractor to the civil penalties and treble damages provisions of that Act.[1] Since the goal of every government contractor ultimately is to obtain payment, the effect of the D.C. Circuit's decision is to render any disputed action or representation by a contractor the basis of a civil False Claims Act violation.

Prior decisions of this Court and other federal courts of appeals have required an actual request for money, or an act capable of inducing the government immediately to part with money, as a prerequisite to False Claims Act liability. The opinion of the D.C. Circuit in the case below irreconcilably conflicts with those decisions. It holds that an implicit goal of ultimately obtaining payment, coupled with conduct in furtherance of contract performance, is sufficient to trigger the False Claims Act. Through this Petition, PRC asks this Court to review the D.C. Circuit's inconsistent interpretation and application of the Act, and to afford PRC relief from the new standard for liability that the ruling below inflicts.

The profound adverse impact of the D.C. Circuit's ruling on the federal contracting relationship is exemplified by the case at hand. Underlying this case is a simple contract dispute between a federal agency and one of its contractors. PRC contracted to design and develop a software system for the Department of Labor. On four occasions PRC delivered software to the government for testing. Each time, the government rejected some or all of the software as non-compliant. Although PRC never has requested payment for

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[1] The basis for jurisdiction in the court of first instance was the FCA and 28 U.S.C. § 1331. *See* Sup. Ct. R. 14.1(g)(ii).

delivery of the rejected software, it disputed the government's assessment of the contract requirements and rejection of the software. Therefore, while continuing to attempt to meet the government's demands, PRC also continued to indicate in its monthly progress reports its belief that it had completed the software development requirements.

Ironically, the contracting agency has not rejected PRC's position that government changes to the contract requirements led to the rejection of the software. Thus, the underlying contract dispute remains unresolved and PRC has not requested payment from the government for delivery of the rejected software. Nonetheless, the D.C. Circuit ruled that PRC's progress reports asserting its position with regard to the ongoing dispute, or its continued efforts to meet the government's demands and deliver the software, exposes PRC to the penalties and multiple damages of the civil False Claims Act. The D.C. Circuit's opinion is unclear whether the progress reports or the software deliveries constitute the actionable claims.

The disruption to the contracting relationship created by the D.C. Circuit's inconsistent and erroneous definition of a claim is heightened by the *qui tam* provisions of the False Claims Act. These provisions authorize private individuals to initiate civil False Claims Act litigation on behalf of the United States, and reward those individuals (referred to as "relators") with a percentage of the amounts recovered by the government. 31 U.S.C.A. § 3730 (West Supp. 1995). Thus, not only the government or its legal representative, the Department of Justice, will determine when a disputed representation or contract action rises to the level of a potential False Claims Act violation. Rather, any individual who becomes aware of a dispute between the government and one of its contractors can initiate a False Claims Act suit

in the hopes of benefiting personally. Indeed, as noted above, in the instant case, the contracting government agency has not ruled against PRC on the underlying contractual dispute, and the Department of Justice declined to intervene in this false claims action. The relator responsible for this litigation, Mervyn Schwedt, is a Department of Labor employee personally involved in the contractual dispute with PRC. As more fully demonstrated below, had Schwedt brought this case in a different circuit, the case would not have been permitted to proceed.

The impact of the D.C. Circuit's decision is exacerbated by its further ruling that FCA penalties apply to false statements in support of claims, as well as to the claims themselves. This ruling, which is contrary to the holdings of this Court and every other appellate court, could result in the imposition of countless penalties unrelated to the number of claims involved, and provides further incentive to *qui tam* relators.

PRC respectfully urges this Court to issue a writ of certiorari and reverse the D.C. Circuit's decision.

B. Background of This Litigation

Pursuant to a Contract between PRC and the General Services Administration ("GSA"), PRC was awarded a Task Order which required it to design and deliver a computer system for the Department of Labor's Pension and Welfare Benefits Administration ("PWBA") that would link the PWBA's national and field offices. The deliverables under the Task Order included hardware components, software subsystems and miscellaneous deliverables such as training manuals. App. at 2a. At issue in this litigation are three progress reports and four software subsystems submitted by PRC under the Contract and Task Order.

Under the Contract and Task Order, after developing the software subsystems, PRC was required to deliver the software to the PWBA for acceptance testing and inspection. App. 3a. The Contract and Task Order prohibited PRC from requesting payment for the software, or for any other deliverable, until the PWBA conducted its testing of the delivered item and determined it to be contractually compliant. *Id.* Only after PWBA notified PRC that the delivered software had been accepted was PRC permitted to submit an invoice for payment. *Id.*

Pursuant to these procedures, the PWBA rejected the software subsystems delivered by PRC on four separate occasions, contending that the subsystems did not comply with required performance criteria. *Id.* PRC did not agree that its software was non-compliant or that the government's rejection of the software was appropriate. Nonetheless, in accordance with the terms of the Contract and Task Order, and as the court of appeals acknowledged, PRC has never submitted an invoice, or otherwise requested payment, for delivery of the rejected software subsystems. App. at 6a.

The Contract also required PRC to submit periodic progress reports to the GSA. *See* App. at 2a. The progress reports included PRC's assessment of the status of its efforts on each of the Task Order deliverables, and a report of PRC's projected activity for the upcoming month. Even after the government rejected PRC's software as non-compliant, PRC continued to indicate in the progress reports its position that the contractually required software effort essentially was complete, but also identified the software development activities it planned to undertake to meet the government's demands. *See* App. at 3a, 10a. As the court of appeals acknowledged, the progress reports were not invoices, and made no claim for payment for the software or any other deliverable. App. at 6a.

C. The Decisions of the District Court and the Court of Appeals

On PRC's motion, the district court dismissed several of Schwedt's allegations under FED. R. CIV. P. 9(b), and the entirety of Schwedt's complaint on summary judgment. *See* App. at 10b. Since PRC did not request payment for the allegedly non-compliant software systems, and its invoices for other contract deliverables were triggered by the government's independent determination that those items met the contract requirements, the district court held that the Relator's cause of action failed as a matter of law. App. at 8b-9b.

Schwedt appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1291. The D.C. Circuit affirmed in part and reversed in part, and remanded the case to the district court to permit Schwedt to proceed with the False Claims Act suit. App. at 10a. In doing so, however, the D.C. Circuit had difficulty identifying the false claim giving rise to the action. The D.C. Circuit expressly ruled that PRC's progress reports are "claims" within the meaning of the False Claims Act. App. at 2a. Thus, in its conclusion, the court stated: "the case is remanded so that Schwedt may pursue his claim that the individual progress reports constitute false claims giving rise to civil penalties and to damages liability." App. at 10a.

However, the D.C. Circuit's reasoning in support of its ruling suggests that it was not the progress reports, but PRC's deliveries of the rejected software that are the claims which sustain this action. Specifically, the Court stated:

> We hold that if . . . PRC knowingly submitted false progress reports stating that the software delivered during the same period was complete when in fact it was not,

> then these progress reports would constitute false statements in support of false claims and would trigger the Act's civil penalty. That the progress reports are not invoices is *immaterial*. They were submitted during the same period that the software was delivered, and they certify the satisfactory completion of that software. Though *PRC did not submit a bill for the software*, its goal of receiving payment was implicit in the submission of the goods, and the accompanying progress reports had the purpose of "get[ting] . . . [the] claim . . . approved." 31 U.S.C. § 3729(a)(2). Accordingly, Schwedt's complaint states a claim based on the three progress reports, and Schwedt may proceed on these claims.

App. at 6a-7a (alterations in original) (emphasis added).

Regardless of whether PRC's progress reports or the deliveries of the software constituted the claims, the court of appeals deemed it "immaterial" that PRC did not invoice or otherwise request payment for the disputed software. Rather, it held that PRC's "implicit" goal of receiving payment under the Contract is sufficient to trigger application of the False Claims Act. *Id.*

Finally, as discussed above, the D.C. Circuit held that each of PRC's allegedly false progress reports were subject to the FCA's civil penalty provisions. In reaching this decision, the court of appeals held that the penalty provisions apply both to false claims and to false statements. Specifically, the court held that "[e]ach individual false claim or statement triggers the statute's civil penalty." App. at 6a (citing *United States v. Bornstein*, 423 U.S. 303, 313 (1976)).

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's decision is in irreconcilable conflict with the previous decisions of this Court and other federal appellate courts in two areas of critical importance. First, the Court's holding that PRC's progress reports, or delivery of allegedly non-compliant software, constitute "claims" under the FCA, even though PRC never requested payment for that software, contradicts this Court's definition of a claim set forth in *United States v. McNinch*, 356 U.S. 595 (1958), and *United States v. Neifert-White Co.*, 390 U.S. 228 (1968). It also contradicts the standards for a claim established by the Courts of Appeals for the First, Third, Sixth, Eleventh and Federal Circuits. As a result, PRC faces substantial liability and is forced to litigate an action that would be dismissed in every other federal circuit which has directly addressed this issue.

Second, the D.C. Circuit's holding that the FCA's penalty provisions apply to statements in support of false claims contravenes the decision of this Court in *United States v. Bornstein*, 423 U.S. 303 (1976), and the decisions of every federal appellate court to consider the issue, including the First, Third, Fourth, Eighth and Ninth Circuits. Thus, PRC is subject to penalties to which it would not be exposed if this False Claims Act litigation had been brought in a different federal circuit.

In addition to creating a conflict among the circuits, the D.C. Circuit's standard of what constitutes a claim would be so vague in application as to create a fundamental unfairness. The punitive aspects of the civil False Claims Act inherent in its penalties and treble damages provisions require a clear standard for application. The D.C. Circuit's definition of a claim is not. The D.C. Circuit's decision provides that an implicit goal of obtaining payment from the government,

plus some act to perform the contract, ranging from a statement contained in progress reports to the submission of products for testing, constitutes a "claim" within the meaning of the FCA. Since a goal of every government contractor is to obtain payment, the D.C. Circuit's decision potentially renders any disputed contract performance or statement by a contractor to a government representative a "claim" under the FCA. This broad and ambiguous definition of a claim, combined with the court of appeals' holding that the FCA penalties apply to statements in support of a claim, could result in a limitless number of FCA violations and penalties, even where there has been no actual request for payment or action capable of inducing the government immediately to part with money.

The effect of the D.C. Circuit's decision is compounded by the collateral consequences of False Claims Act violations to government contractors and others that deal with the government, consequences potentially more severe than the liability imposed by the Act. For example, a federal contractor may be debarred and rendered ineligible for future government business based on a civil False Claims Act violation. *See* Federal Acquisition Regulation ("FAR") subpt. 9.4, 48 C.F.R. subpt. 9.4 (1994). A federal grantee may be declared ineligible for future federal grants or assistance. *See* 41 C.F.R. § 105-68.305(a)(3) (1995). A Medicare or Medicaid provider may be excluded from eligibility from the program. *See* FAR § 1609.7001(c)(1), 48 C.F.R. § 1609.7001(c)(1) (1994). This Court's review is required to provide a consistent and unambiguous definition of the conduct that could result in substantial punishment under the FCA and even more severe collateral consequences.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION THAT A "CLAIM" DOES NOT REQUIRE A REQUEST FOR MONEY OR PROPERTY, OR AN ACTION CAPABLE OF INDUCING THE GOVERNMENT IMMEDIATELY TO PART WITH MONEY OR PROPERTY, REQUIRES THE INTERVENTION OF THIS COURT

In expanding the definition of a "claim" to include PRC's progress reports, or the delivery of allegedly non-compliant software, the D.C. Circuit is in direct conflict with the decisions of this Court and five other federal appellate courts that have addressed the issue, as well as with the FCA's definition of a "claim" and the legislative history underlying that definition.

A. The D.C. Circuit's Decision Irreconcilably Conflicts With Supreme Court Precedent

This Court first directly addressed the definition of a "claim" in *United States v. McNinch*, 356 U.S. 595 (1958). In that case, the government brought suit under the FCA against persons who had filed fraudulent loan applications with a private bank. The bank, which was insured by the Federal Housing Administration against losses on the loans, granted the loans based on the fraudulent applications.

The government's complaint alleged that the defendants had caused the bank to present a number of false applications for credit insurance to the FHA, and that these applications constituted "claims" under the FCA. *See* 356 U.S. at 597 & n.4. The *McNinch* court rejected the government's theory of liability, holding that "[i]n agreeing to insure a home improvement loan the FHA disburses no funds nor does it

otherwise suffer *immediate* financial detriment. It simply contracts, for a premium, to reimburse the lending institution in the event of future default, if any." *Id.* at 599 (emphasis added).

In arriving at this conclusion, the Court emphasized that " 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " *Id.* (quoting *United States v. Tieger*, 234 F.2d 589, 591 (3rd Cir.), *cert. denied*, 352 U.S. 941 (1956)). Thus, since the defendants had not defaulted on their loans, thereby triggering a demand for payment on the United States by the banks, there were no claims on which to predicate an FCA action.

The *McNinch* Court further stated that "it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." 356 U.S. at 599. The Court observed that its holding was consistent with all of the courts of appeals and district courts who had considered the question. *Id.* at 599-600.

In *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), this Court refined its definition of a "claim." In *Neifert-White*, the defendant had prepared falsely inflated invoices which were submitted to the government in support of loan applications. The inflated invoices caused the government to provide the defendant with loans which exceeded the amount otherwise justified.

At issue before the *Neifert-White* Court was whether a "claim" encompassed a loan request, as distinguished from a claim for payment of an obligation owed by the government. The Court declined to adopt this distinction. 390 U.S. at 233. In holding that the false loan applications, submitted together with the inflated invoices, were "claims" within the scope of the FCA, the Court stated that "[i]t is sufficient to note that

the instant case involves a false statement made with the purpose and effect of inducing the government *immediately* to part with money." *Id.* at 232 (emphasis added).

Even the broadest readings of *McNinch* and *Neifert-White* do not support the D.C. Circuit's expansion of the definition of a "claim" to include progress reports or delivery of software, absent a request or demand for payment for the allegedly defective software. To the contrary, this case is directly governed by *McNinch*. Even if PRC's progress reports overstated the software development status, or the delivered software were not contractually compliant, neither the reports nor the deliveries included a request for payment. Absent any action constituting a demand for transfer of money or property, under *McNinch* there is no claim and no basis for an FCA action.

In reaching a contrary result, the D.C. Circuit relied on this Court's statement in *Neifert-White* that the FCA " 'reaches beyond "claims" which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.' " App. at 6a (quoting *Neifert-White*, 390 U.S. at 233). That reliance is erroneous. As noted above, the issue before the Court in *Neifert-White* was whether the FCA extended beyond the government's financial obligations, i.e., "legally enforceable claims," to loan applications. In ruling that the FCA also covered fraudulent loan applications, *Neifert-White* did not extend the FCA to cover false statements alone. Rather, *Neifert-White*, like *McNinch*, requires as an element of an FCA violation conduct capable of inducing the government *immediately* to part with money. As acknowledged by the D.C. Circuit, neither PRC's progress reports nor its software deliveries had that purpose, *see* App. at 6a-7a, and, accordingly, this action should not be permitted to proceed.

B. The D.C. Circuit's Decision Conflicts With the Decisions of Other Federal Courts of Appeals

The federal Courts of Appeal uniformly have followed the rationale articulated in *McNinch* and *Neifert-White*, requiring a demand for money or property, or other action capable of inducing the government immediately to part with money or property. For example, in a recent decision, the First Circuit held that the defendants had caused a false claim for mortgage insurance loan benefits to be presented to a government agency. *United States v. Rivera*, 55 F.3d 703 (1st Cir. 1995). In determining whether the limitations period had expired, the First Circuit held that the claim was not filed when defendants submitted their false statements to the lenders, or when the lender notified the government of the default and of its intent to seek insurance proceeds. 55 F.3d at 707-08. Rather, a claim was presented when the lender submitted an application to the government specifying the amount of insurance proceeds the lender expected to receive. The court reasoned that, like an invoice or a bill, the application was capable of inducing the government to part with its money immediately. *Id.* at 710.

The Sixth Circuit also has upheld the requirement that a claim must have as a characteristic the purpose and effect of *immediately* inducing the government to part with money. In *United States v. Ekelman & Associates., Inc.*, 532 F.2d 545 (6th Cir. 1976), the Sixth Circuit determined that a lending institution's application to the FHA for credit insurance on a home loan did not constitute a "claim" against the government under the FCA. Relying on *McNinch* and *Neifert-White*, the Sixth Circuit held that no violation of the FCA arises until the mortgage holder presents a claim to the government for *payment* on the guaranty or insurance. 532 F.2d at 552.

Similarly, the Federal Circuit Court of Appeals held that applications for government guaranties submitted to the government did not violate the FCA. *Brunswick Bank & Trust Co. v. United States*, 707 F.2d 1355, 1364-65 (Fed. Cir. 1983). The court held that to determine whether a false claim for payment has been presented upon the United States, "a court must focus on the actual claim for reimbursement," and whether the alleged misrepresentation made the claim invalid or false in any respect. *Id.* at 1365 n.13.

The D.C. Circuit's ruling also conflicts with the Third Circuit's decision in *United States v. Tieger*, 234 F.2d 589 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956). There, the Third Circuit affirmed dismissal of an FCA suit alleging that the government fraudulently was induced to guarantee repayment of real estate improvement loans by the defendant. The court held that the "promise of the United States to make good if a borrower shall default" is not a claim under the FCA. 234 F.2d at 591. The Third Circuit further observed that "the conception of a claim against the government normally connotes a demand for money or for some transfer of public property." *Id.* Since the loans had been repaid in full, a demand for payment had not been made to the government, and an FCA action could not be sustained.

The Eleventh Circuit considered the definition of a claim in *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988). The case involved a kickback scheme in which falsified invoices were submitted to the government for reimbursement in connection with hurricane relief efforts. In holding the invoices to be actionable "claims" under the Act, the Eleventh Circuit held that "[c]ase law on this issue indicates that each separate fraudulent submission by a defendant *demanding payment* from the government is a 'claim.' " *Id.* at 1533 (emphasis added).

In the present case, neither the progress reports nor the submission of the software satisfies the "immediacy" standard required for a claim by the circuit decisions discussed above, or by this Court. It is undisputed that PRC's progress reports made no request for payment. There simply is nothing in the progress reports that reasonably could be construed to be an attempt to induce the government immediately to part with money.

Similarly, the submission of the software for testing does not constitute a "claim" as defined by the courts of appeals identified above, or by this Court. The D.C. Circuit acknowledged that PRC *never* submitted a bill for the rejected software. App. at 6a-7a. The D.C. Circuit's reasoning that an implicit "goal of receiving payment," coupled with some act of contract performance, constitutes an FCA claim, App. at 7a, is directly contrary to the standard articulated by the other courts of appeals and this Court. The D.C. Circuit's ruling renders actionable any statements or acts in performance of a contract, regardless of whether conduct has occurred that is capable of causing the government to part with money or property. In essence, the D.C. Circuit seeks to punish inchoate claims based on anticipated conduct.

It is clear from the foregoing case law that the Relator's cause of action would not survive in the First, Third, Sixth, Eleventh and Federal Circuits because there is no "claim" in this case upon which to base an FCA action. Unfortunately for PRC, however, this action was brought in the D.C. Circuit, and PRC must continue to litigate. This Court should redress the injustice which has resulted from this lack of uniformity.

C. The Express Language of the FCA and Its Legislative History Establish the Requirement of a Demand for Payment or Other Conduct Capable of Inducing the Government Immediately to Part with Money or Property

The "immediacy" standard articulated by this Court in *McNinch* and *Neifert-White*, and by the various courts of appeals discussed in the preceding section, implements the express language of the FCA and the objectives of Congress as demonstrated by the Act's legislative history.

The FCA establishes liability for a person who "knowingly presents . . . a false or fraudulent claim for payment or approval," 31 U.S.C.A. § 3729(a)(1) (West Supp. 1995), or who knowingly uses "a false record or statement to get a false or fraudulent claim paid or approved by the Government," *id.* § 3729(a)(2). To violate either of these provisions, the express language of the statute and existing case law require, *inter alia*, the presentation of a false or fraudulent claim for payment to the United States. *See, e.g., Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1007 (2d Cir. 1987); *see also* John T. Boese, *Civil False Claims & Qui Tam Actions* 2-11 (Supp. 1995).

Section 3729(c) of the FCA defines a "claim" as including "any request or demand, whether under a contract or otherwise, for money or property . . . if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C.A. § 3729(c) (West Supp. 1995). Neither PRC's progress reports, nor its delivery of the software for testing, incorporated or accompanied any request or demand for money or property. Thus, in the instant case, neither the progress reports nor the

software deliveries meets the definition of a claim set forth in the statute.

Further, the legislative history of the FCA indicates that it was not intended to cover statements or representations, absent a demand for payment. The first False Claims Act imposed both civil and criminal liabilities for false claims, for preparing a written instrument that contained fraudulent or fictitious statements with the purpose of aiding in the payment or approval of such a claim, or for conspiring to defraud the government by obtaining payment of allowance of a false claim. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

In 1873, all federal laws were repealed, then re-enacted in a revised form and embodied in what was then entitled the Revised Statutes (R.S.). This was Congress's first attempt to categorize laws according to subject matter.[2] In conformance with this new subject matter format, the civil sanctions of the False Claims Act were codified as R.S. § 3490, Act of Mar. 2, 1877, § 3490, 18 Stat. § 691, while the criminal provisions were separately enacted as R.S. § 5438, Act of Mar. 2, 1877, ch. 5, § 5438, 18 Stat. 1054; *see Rainwater v. United States*, 356 U.S. 590, 592 n.8 (1958) (explaining separation of criminal provision from civil sanctions of False Claims Act).

At that time, the requirement for a claim was identical in both the civil and criminal False Claims Acts. In fact, the civil statute, R.S. § 3490, incorporated by reference the

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[2] *See* Act of Mar. 3, 1873, ch. 241, 17 Stat. 579; *see also* Hearings on H.R. 5450 Before the House Comm. on Revision of the Laws, 78th Cong., 2d Sess. (1944), *reprinted in* 1948 U.S. Code Cong. Serv. Special Pamphlet 2661 (containing Act of June 25, 1948, ch. 645, legislative history, reviser's notes, and congressional debates).

language in the criminal provision, R.S. § 5438, to identify the acts that created the civil liability. *Rainwater*, 356 U.S. at 592 n.8. When the United States Code was recodified again in the early 1900s, the civil and criminal false claims provisions remained unchanged, and the civil statute continued to incorporate by reference the new criminal section. *See* 31 U.S.C. § 231, 18 U.S.C. § 80 (1926).

In 1934, only the criminal false claims provision, 18 U.S.C. § 80, was amended for the express purpose of making false statements to the government a crime in and of themselves. *See* Act of June 18, 1934, ch. 587, 48 Stat. 996. This amendment was sought because of the "lack of a law under which prosecutions might be had 'for the presentation of false papers.' " *United States v. Gilliland*, 312 U.S. 86, 94 & n.8 (1941) (quoting letter from Secretary of Interior to Chairman of Senate Judiciary Comm. of Feb. 7, 1934); *see generally id.* at 91-95.[3]

Significantly, the change in the criminal false claims provision to cover false statements intentionally was *not* extended to the civil False Claims Act. Instead, the civil False Claims Act was changed no longer to incorporate by reference the new criminal False Claims Act, but rather to maintain the pre-existing language setting forth the conduct which would establish civil False Claims Act liability. *See* 31 U.S.C. § 231 (1934). That language is virtually identical to the language in the current civil False Claims Act. *Compare* 31 U.S.C.A. § 3729 (West Supp. 1995).

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[3] The new false statement provision was separately codified at 18 U.S.C. § 1001 as part of a revision of the Criminal Code in 1948. *See* Act of June 25, 1948, ch. 645, § 1001, 62 Stat. 683, 749.

It is clear from the foregoing legislative history that Congress considered and rejected extending coverage of the civil False Claims Act to representations or conduct not connected to a request or demand for money or property. The D.C. Circuit's holding that PRC's progress reports or software deliveries may constitute "claims" accomplishes precisely the result which Congress rejected, i.e., it eliminates a request or demand for money or property as an element of a civil False Claims Act violation.

II. THE D.C. CIRCUIT'S RULING THAT STATEMENTS IN SUPPORT OF CLAIMS ARE SUBJECT TO THE FCA'S CIVIL PENALTIES IS IN IRRECONCILABLE CONFLICT WITH THE HOLDINGS OF THIS COURT AND THE OTHER FEDERAL COURTS OF APPEALS

The D.C. Circuit ruled that "if . . . PRC knowingly submitted false progress reports stating that the software delivered during the same period was complete when in fact it was not, then these progress reports would constitute false statements in support of false claims and would trigger the Act's civil penalty." App. at 6a. In so reasoning, the court held that "[e]ach individual false claim *or statement* triggers the statute's civil penalty." *Id.* (emphasis added) (citing *United States v. Bornstein*, 423 U.S. 303, 313 (1976)).

The court's conclusion here completely departs from well-established case law. This Court, the Ninth Circuit, and all other appellate courts considering this issue have held that FCA penalties attach *only* to false or fraudulent claims for payment, and not to false statements accompanying those claims.

The leading case on this issue is the Ninth Circuit's decision in *United States v. Woodbury*, 359 F.2d 370 (9th

Cir. 1966). In *Woodbury*, the Ninth Circuit upheld the district court's award of statutory penalties for ten false applications for payment submitted to the government. The government contended that the FCA's "false records" provision required an additional twenty-two penalties—one for each of twenty-two documents attached to the false applications. *See id.* at 377-78. The Ninth Circuit rejected the government's argument and held that the government was not entitled to penalties for the false records. *Id.* at 378 (citing *United States v. National Wholesalers*, 236 F.2d 944, 950-51 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957)).

The Ninth Circuit's holding was favorably cited by this Court in *United States v. Bornstein*, 423 U.S. 303, 309 n.4 (1976). In *Bornstein*, this Court observed that "the number of imposable forfeitures has generally been set at the number of individual false payment demands that the contractor has made upon the Government." *Id.* The *Bornstein* court further held that this result was in accord with prior Supreme Court authority holding that " 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " *Id.* (quoting *McNinch*, 356 U.S. at 599).[4]

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[4] At least one court has interpreted *Bornstein* to be an affirmation that penalties apply to "claims," but not to statements made in support of claims. In *Miller v. United States*, 550 F.2d 17 (Ct. Cl. 1977), the Court of Claims imposed penalties upon a contractor for the submission of five false invoices, but not for eleven false papers used to support the invoices. The court stated:

> In finding five, not sixteen, false claims, we agree with the Ninth Circuit decision in *United States v. Woodbury*, 359 F.2d 370 (1966). In *Woodbury*, the court held that separate penalties are not

(Footnote cont'd on next page)

All appellate courts considering this issue are consistent with *Woodbury*. In *United States v. Grannis*, 172 F.2d 507, 515-16 (4th Cir), *cert. denied*, 337 U.S. 918 (1949), the Fourth Circuit held that the government was entitled to one penalty for each of ten vouchers, and not one penalty for each of 130 false schedules attached to the vouchers. In *United States v. Rohleder*, 157 F.2d 126, 131 (3d Cir. 1946), the Third Circuit held that, where the subcontractor submitted ninety false bids under sixteen subcontracts, the government only could recover statutory forfeitures on the sixteen subcontracts. *See also United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 65 (8th Cir. 1973) (imposing only one penalty for each claim, and not for each related false statement); *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) (FCA "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment' ").

Further, in passing the 1986 Amendments to the FCA, Congress clearly stated its intent that the statutory forfeitures apply only to false claims, and not to false records. The

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(Footnote cont'd from previous page.)

> imposed based upon the number of false papers contained in a particular claim made upon the government. 359 F.2d at 378. The court reasoned that each amount requested from the government is a claim, so regardless of the number of false invoices that were used in arriving at each demand, only one penalty per demand is imposed. *Id.*
>
> This position is supported by the recent Supreme Court case, *United States v. Bornstein* . . . .

550 F.2d at 24.

Senate Report states that the forfeiture provisions in the FCA "[are] not intended, however, to provide additional penalties where only a false statement has occurred." S. Rep. No. 345, 99th Cong., 2d Sess. 20, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285.

The D.C. Circuit's holding that FCA penalties apply to statements made in support of claims is in irreconcilable conflict with the decisions of this Court and every other federal appellate court that has considered the issue. As a result, the court of appeals' decision has created conflict among the federal appellate courts, and inconsistent standards of liability. The D.C. Circuit's decision has subjected PRC to penalties under a standard that has been rejected by every other circuit.

If allowed to stand, the D.C. Circuit's decision regarding penalties will vastly increase the scope of liability under the FCA. Every statement or representation, written or oral, made by a contractor could serve as the basis for a penalty, regardless of the number of claims involved. The result is to impose penalties unrelated to the number of violations of the prohibited conduct, i.e., the submission of a false or fraudulent claim. This in turn will create a flood of new suits by opportunistic *qui tam* relators hoping to profit from the greatly expanded penalty provisions. This Court should grant this Petition and restore uniformity to the law among the Circuits.

CONCLUSION

Two vital public policy concerns are at stake in this case. First, it is imperative that government contractors be able to perform their contracts without being subjected to False Claims Act litigation, initiated by either the government or *qui tam* relators, any time a contractor's performance or

representations to the government are disputed. The public has an interest in ensuring that federal contracts are properly performed and free of fraud, waste and abuse. The D.C. Circuit's decision, however, neither serves the public interest nor achieves the objectives underlying the civil False Claims Act. Rather, the decision subjects every government contract dispute to a False Claims action. The result will be a significant increase in litigation and disruption to the contracting process, and increased costs of contract performance that ultimately will be borne by the public.

Second, it is imperative that liability for a civil False Claims Act violation, which includes penalties and multiple damages as well as extensive collateral consequences, be imposed uniformly, predictably, and fairly. The D.C. Circuit's vague definition of a claim, which conflicts with the precedent of this Court and other federal circuits, does not achieve that objective.

This Court can provide the guidance necessary to address both of these concerns by granting this Petition and issuing a writ of certiorari. PRC urges this Court to grant this Petition.

Respectfully submitted,

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APPENDIX

UNITED STATES of America ex rel., Mervyn A. SCHWEDT, Appellant,

v.

PLANNING RESEARCH CORPORATION, a Virginia Corporation, Appellee.

No. 94-7091.

United States Court of Appeals, District of Columbia Circuit.

Argued April 7, 1995.
Decided July 7, 1995.

Appeal from the United States District Court for the District of Columbia (No. 92cv01951).

William G. Kopit, Washington, DC, argued the cause and filed the briefs for appellant. Mervyn A. Schwedt entered an appearance pro se.

Frederick M. Levy, Washington, DC, argued the cause for appellee. With him on the brief was Gregory T. Jaeger, Washington, DC.

Before: EDWARDS, Chief Judge; WALD and GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Mervyn A. Schwedt, Director of the Office of Information Management at the Department of Labor's Pension and Welfare Benefits Administration ("PWBA"), brought this action against Planning Research Corporation ("PRC") under the *qui tam* provision of the False Claims Act

("Act"), 31 U.S.C. § 3729 *et seq.* (1988 & Supp. V 1993). Schwedt claims that in the course of performance of a contract under which PRC was to design a software system for the PWBA, PRC submitted false progress reports about the status and success of the system, inducing the government to pay for various components of the project that it would not otherwise have accepted. The district court dismissed most of Schwedt's complaint and granted summary judgment to PRC on the remainder. *See United States ex rel. Schwedt v. Planning Research Corp., Inc.*, No. Civ. 92-1951-LFO, slip op. at 8, 10, 1994 WL 118222 (D.D.C. Mar. 31, 1994). We hold that Schwedt has made sufficient allegations to proceed on his claim that PRC's progress reports constitute false claims under the Act, for which he may pursue the statutory civil penalty, and on his claim that these progress reports caused the government to accept and pay for various items under the contract that were worthless on their own, for which he may pursue treble damages under the Act.

I. BACKGROUND

In 1989, the PWBA entered into a contract with PRC under which PRC was to design and put into place a computer software system that would link the PWBA's national and field offices. The terms of this agreement are embodied in two documents, a Task Order and a Contract. Under the Task Order, PRC is to complete seven sequential segments, termed "milestones," running from the initial design of the system through production of software and manuals to presentation of a final report. Task Order at 5-12, *reprinted in* Appellee's Supplemental Appendix ("S.A.") at 13-20. The Task Order also sets out a series of individual "deliverables," such as the software, training manuals, and reports, each of which is due at a particular stage of the project and is to be

paid for upon acceptance by the government. Task Order at 12, *reprinted in* S.A. at 20.

The Task Order and Contract establish an acceptance and payment system for each of the deliverables. Upon receipt of the software, for instance, the government has a 20-day "Client Acceptance Period" during which it will "complete review of each deliverable and accept or reject the deliverable in writing. [It] will have the right to reject or require correction of any deficiencies that are contrary to the information contained in the contractor's accepted proposal." Task Order at 20, *reprinted in* S.A. at 28. Under the agreement, the government will accept the software only "if it is complete, comprehensive and complies with" the contract specifications. *Id.* Finally, no payment can be requested or made absent such acceptance: "[a]ny deliverable products under this contract will be accepted or rejected" in writing by the government, Contract ¶ E.1, *reprinted in* S.A. at 61, and "[p]ayment of invoices will be made based upon acceptance by the Government," Contract ¶ D.a., *reprinted in* S.A. at 62.

In the course of performing the contract, PRC made four deliveries of the software and submitted three progress reports. The first and last of these progress reports represented that the software was "100%" complete; the second represented that each of the four software components was either "99%" or "100%" complete. Progress Report of July 9, 1990, at 2, *reprinted in* S.A. at 64; Progress Report of Dec. 5, 1990, at 2, *reprinted in* S.A. at 67; Progress Report of Mar. 11, 1991, at 2, *reprinted in* S.A. at 70. According to allegations in the complaint and affidavit filed by Schwedt, who was responsible for overseeing the contract, the government rejected the software after testing on each of these occasions. At some point after the fourth delivery, however, the government did accept and pay $145,534 for one of the four subparts of the software. During this same period, the govern-

ment also accepted and paid an additional $364,000 for other non-software deliverables. Over the course of performance, according to allegations in Schwedt's affidavit, PRC submitted two written requests for "equitable adjustments" approaching $2 million in excess of the original contract amount and made two oral demands for payment for the software. Schwedt Aff. ¶¶ 14-18, *reprinted in* Appellant's Appendix ("A.A.") at 32-33. The filings do not detail the basis on which PRC claimed entitlement to the equitable adjustments.

In 1992, Schwedt filed this *qui tam* action, alleging that PRC violated the False Claims Act by "unlawfully and knowingly on no less than four occasions present[ing] and caus[ing] to be presented non-functional and non-compliant software to representatives of the United States while wrongfully and knowingly misrepresenting that said software was compliant and functional." Complaint ¶ 25, *reprinted in* A.A. at 12.

The district court dismissed the bulk of Schwedt's complaint under Federal Rule of Civil Procedure 9(b) for failure to meet the heightened pleading requirements for fraud and granted summary judgment on the only claim it believed to be adequately pleaded. It held that several of the alleged "false claims"—the $364,000 in payments for unidentified, non-software deliverables and the two requests for equitable adjustment—were not identified with adequate specificity to meet the heightened pleading requirements for fraud. FED. R. CIV. P. 9(b). With respect to the single alleged "false claim" it found to be adequately pleaded—PRC's invoice for the one software component accepted by the government—it concluded that, even if it were a "false claim," Schwedt could not show any damages, because under the terms of the contract the government had to inspect and approve any PRC submission before payment. The district court did not discuss

whether the progress reports themselves might constitute "false claims" or "statements" under the Act, and it neglected to address the provision of the Act imposing a civil penalty for the mere submission of a false claim, whether or not that claim brings about any damages.

II. ANALYSIS

The False Claims Act provides that:

> Any person who
>
> > (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval; [or] (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

31 U.S.C. § 3729(a) (1988). Thus, the Act imposes two sorts of liability. First, the submitter of a "false claim" or "statement" is liable for a civil penalty, regardless of whether the submission of the claim actually causes the government any damages; even if the claim is rejected, its very submission is a basis for liability. Second, the submitter of the claim is liable for damages that the government sustains because of the submission of the false claim.

A. "False Claims"

The Act penalizes the presentation of a "false or fraudulent claim for payment" or the use of "a false record or statement to get a false or fraudulent claim paid." 31 U.S.C. § 3729(a). A submission need not be an actual invoice to be a "claim" or "statement" under the Act. As the Supreme Court explained in *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S. Ct. 959, 962, 19 L. Ed. 2d 1061 (1968), "[t]his remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." Each individual false claim or statement triggers the statute's civil penalty. *See United States v. Bornstein*, 423 U.S. 303, 313, 96 S. Ct. 523, 530, 46 L. Ed. 2d 514 (1976).

Schwedt's complaint identifies the false claims on which he bases his action: "on no less than four occasions [PRC] present[ed] and cause[d] to be presented non-functional and non-compliant software to representatives of the United States while wrongfully and knowingly misrepresenting that said software was compliant and functional." Complaint ¶ 25, *reprinted in* A.A. at 12. In dismissing the bulk of this complaint, the district court failed to consider that the individual progress reports, though not in themselves actual invoices, might constitute "false claims" or "statements" under the Act.

We hold that if, as Schwedt alleges, PRC knowingly submitted false progress reports stating that the software delivered during the same period was complete when in fact it was not, then these progress reports would constitute false statements in support of false claims and would trigger the Act's civil penalty. That the progress reports are not invoices is immaterial. They were submitted during the same period that the software was delivered, and they certify the satisfac-

tory completion of that software. Though PRC did not submit a bill for the software, its goal of receiving payment was implicit in the submission of the goods, and the accompanying progress reports had the purpose of "get[ting] . . . [the] claim . . . approved." 31 U.S.C. § 3729(a)(2). Accordingly, Schwedt's complaint states a claim based on the three progress reports, and Schwedt may proceed on these claims.

From Schwedt's affidavit, but not his complaint, it is possible to discern allegations of a distinct set of false claims. This filing can be read to claim that PRC made an initial misrepresentation about its capability to perform the contract in order to induce the government to enter into the contract and that this original misrepresentation tainted every subsequent claim made in relation to the contract, including PRC's claims for payment for the non-software deliverables and its claims for equitable adjustments. *Cf. United States v. Marcus ex rel. Hess*, 317 U.S. 537, 543, 63 S. Ct. 379, 384, 87 L. Ed. 443 (1943) (where original contract was obtained through collusive bidding, initial "taint entered into every swollen estimate which was the basic cause for payment of every dollar paid"). At oral argument, however, Schwedt declined to pursue this theory, informing the court that the allegedly false progress reports constitute the heart of his suit. We therefore hold that any fraud in the inducement claim potentially discernible from Schwedt's affidavit is waived.[1]

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[1] Because we find that the only theory on which the equitable adjustments and the invoices for accepted goods are potentially relevant as "false claims" is waived, we need not address the district court's conclusion that these "claims" were inadequately pleaded under Federal Rule of Civil Procedure 9(b).

B. Damages

Schwedt claims that PRC is liable not only for the statutory civil penalty for each progress report submitted, but also for damages that the government suffered because of these progress reports. He alleges that he made, on behalf of the government, a total of approximately $500,000 in payments for various deliverables under the contract because of PRC's progress report representations that the project would ultimately come together and that these payments are therefore damages recoverable under the Act: "*But for* the progress reports and representations by PRC, I would *not* have accepted and paid for the milestone products which are worthless without contractually compliant software." Schwedt Aff. ¶ 10, *reprinted in* A.A. at 31.

The statute holds the submitter of a false claim or statement liable for "3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a). We hold that if Schwedt is able to prove that he relied on the progress reports' representations that the project was nearing successful completion in deciding to pay for the individual components, those payments may constitute damages under the Act. PRC urges that because the contract between PRC and the government allowed for payments *only* upon the government's *own* inspection and acceptance of the deliverables, Schwedt cannot establish that these payments are "because of" the alleged false statements and thus cannot claim them as damages under the Act. This argument, however, misstates the logic of Schwedt's claim. Under Schwedt's allegations, it is immaterial that the government found the *individual* components to be contractually compliant or even that they were, in fact, compliant. He urges that even if, say, the manual was in *perfect* form, it was useless to the government without the whole package, and he would not have paid for it if not for PRC's representations that the

whole package was imminently available. If Schwedt is able to establish what he alleges, he has surely established damages "because of" the allegedly false progress reports.

PRC further points to several circuits that have concluded that the Act does not contemplate liability for all damages that would not have arisen "but for" the false statement. *See United States v. Miller*, 645 F.2d 473, 475-76 (5th Cir. 1981); *United States v. Hibbs*, 568 F.2d 347, 351 (3d Cir. 1977). Surely, we agree. Schwedt's claim, however, survives under the more restrictive standard adopted in those cases. The Third and Fifth Circuits there concluded that the submitter of a false claim should be liable only for those damages that arise because of the *falsity* of the claim, *i.e.*, only for those damages that would not have come about if the defendant's misrepresentations had been true. *See Miller*, 645 F.2d at 475-76; *Hibbs*, 568 F.2d at 351. In this case, if PRC's misrepresentations had been true—that the software, which formed the heart of the contract, was at or near successful completion—then the government's payments for various goods would not have been damages—money spent on useless goods. The payments would have been money well spent. Thus, we conclude that Schwedt may proceed on his claim that the false certifications in the progress reports led him to accept and pay for the various deliverables and that these payments constitute damages under the Act.

We pause to note, however, that our conclusion on this point might have been different if PRC could demonstrate that the contract was structured in such a way that, regardless of any misrepresentations it may have made about its progress in performing the other aspects of the contract, the government was contractually required to pay for any delivered components that met the contract's specifications. If the contract has been so structured, then the alleged misrepresentations concerning PRC's ability to perform the rest of the

project would not have caused any damages at all; they would simply be irrelevant. PRC cannot make such a demonstration, however, because the contract empowers the government to terminate the contract for default if the contractor's performance is defective and the contractor fails to take steps to "ensure future performance in conformity with contract requirements." Contract ¶ E.2(e), *reprinted in* S.A. at 61. Absent PRC's (alleged) misrepresentations concerning its ability to perform the rest of the contract, the government could have, by terminating the contract prior to accepting those deliverables that it ultimately concluded met the contract specifications, avoided making payment (and thus incurring damages).

III. CONCLUSION

In accordance with the discussion above, the opinion of the district court is affirmed in part and reversed in part and the case is remanded so that Schwedt may pursue his claim that the individual progress reports constitute false claims giving rise to civil penalties and to damages liability.

Remanded.

UNITED STATES ex rel.
Mervyn A. SCHWEDT, Plaintiff,

v.

PLANNING RESEARCH CORP., INC., Defendant.

Civ. A. No. 92-1951-LFO.

United States District Court, District of Columbia.

March 31, 1994.

MEMORANDUM

OBERDORFER, District Judge.

This *qui tam* action was brought under the False Claims Act by an employee of the Department of Labor against a computer software designer, Planning Research Corp., Inc. (PRC). PRC has filed a motion to dismiss, and in the alternative, a motion for summary judgment. The United States declined to intervene, but at the request of the Court, has filed a brief as amicus curiae.

I.

PRC's Memorandum establishes, without substantial contradiction, that it agreed to develop a software subsystem to enable the Pension and Welfare Benefits Administration (a division of the Department of Labor) to communicate via computer with its field offices. The contract, or Task Order, separated PRC's performance into seven separate segments, denominated as "milestones," each containing specified deliverables. Central here, the Task Order established a procedure by which the government was entitled to inspect, test, and reject most of the deliverables before it made any payment to the PRC. Altogether, there were twenty deliverables under the Task Order. Sixteen deliverables were accepted (or

otherwise completed). PRC invoiced the Department and a total of $509,650 was paid by the government. Of particular interest here are four items of software subsystem deliverables, each separately priced, and denominated in the contract as: 3.12 CMIS Development, 3.13 EAS Interface Subsystem, 3.14 FO EAS Subsystem and 3.15 No EAS Access Subsystem.

PRC repeatedly submitted these four deliverables to the government for testing. After both the June 8, 1990 and the December 7, 1990 deliveries, the department rejected the entire set of deliverables. On May 17, 1991, a third shipment resulted in the government's "acceptance" of one item, the 3.15 software for which PRC presented an invoice and was paid $145,534.[1] The other three deliverables were rejected. On September 13, 1991, PRC resubmitted the three previously rejected items, the government not only rejected those three again, but, on November 7, 1991 issued a Stop Work Order. No more work has been performed under the Task Order. PRC subsequently requested two "equitable adjustments" totalling $2.1 million. At a May 29, 1992 meeting PRC representatives made an oral demand for $2.1 million.

On August 24, 1992, plaintiff filed this action, as a *qui tam* relator, under the False Claims Act, 31 U.S.C. §§ 3729-33 (1988 & Supp. 1991). Plaintiff alleges that "PRC did unlawfully and knowingly on no less than four occasions present and cause to be presented non-functional and non-compliant software to representatives of the United States while wrongfully and knowingly misrepresenting that said

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[1] This cost for the 3.15 deliverable is included in the total figure of $509,650 disbursed by the government.

software was compliant and functional." Complaint at ¶ 25. Plaintiff further alleged that "PRC did knowingly submit misleading and factually incorrect written reports." Complaint at ¶ 26. According to plaintiff, "as a result of PRC's actions, the government incurred substantial expenses and cost that would not have been incurred, absent PRC's misrepresentations." Complaint at ¶ 28.

II.

PRC argues that plaintiff is attempting to convert a contract dispute into a False Claims Act case. PRC also raises two technical defenses that plaintiff has not properly alleged the elements of a cause of action under the False Claims Act. First, PRC argues that the "requests" referred to in the complaint and in plaintiff's Memorandum are not "claims" as contemplated by the False Claims Act. Second, PRC argues that plaintiff did not plead with sufficient specificity for an allegation of fraud.

II-A.

In order to sustain a cause of action under the False Claims Act, a plaintiff must prove that a claim for payment was made and that the claim was based on a misrepresentation or was otherwise fraudulent. *See, e.g. United States ex rel. Glass v. Medtronic, Inc.*, 957 F.2d 605, 608 (8th Cir. 1992). PRC argues, in essence, that a "claim" must be an invoice and PRC never invoiced the Department for any of the rejected software.

Plaintiff responds first that PRC is reading the statute too narrowly. There is significant authority for plaintiff's position. The term "claim" "reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 244 (1968). "[A]ny actions

which have the purpose and effect of causing the Government to immediately pay out money are clearly 'claims' within the purpose of the Act." *United States v. Silver*, 384 F. Supp. 617, 620 (E.D.N.Y.1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975). Plaintiff concludes that actual invoices are not required.

Plaintiff also contends that PRC made several requests for funds that are claims as contemplated by the statute. In plaintiff's view, PRC's "claims" include the invoice and payment for the accepted software, an oral demand for payment for the software on May 29, 1992, and the requested "equitable adjustments" for costs related to the software. Pl.'s Mem. at 18-19, nn. 9 & 10. Plaintiff also notes that PRC submitted invoices for the approximately $364,000 for deliverables related to software. Pl.'s Mem. at ¶¶ 3, 5 & 17.

The government, in its amicus brief, concludes that the invoices for $145,534 (accepted software) and approximately $364,000 (related deliverables) are "certainly captured within the broad definition of a claim under the FCA." Amicus Brief at 7. The government also concludes that PRC's request for $2,160,000 in "equitable adjustment" is also a claim under the FCA. However, the government does not regard the oral demands cited by plaintiff as claims in themselves. PRC's oral requests, as documented, "merely echo claims that PRC had already submitted . . . or intended to and eventually did submit." *Id.* at 8. The government's conclusions are limited to the nature of a claim and do not go to the issue of falsity. In support of its broad interpretation the government relies on *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) and the legislative history of the 1986 amendments to the False Claims Act. S. Rep. No. 345, 8-10, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.

The government's reasoning is persuasive. PRC's dispositive motion based on the definition of "claim" under the statute is granted only with respect to the oral requests for payment. The invoice for the accepted software, the invoices for related materials, and the requests for "equitable adjustment" are all "claims," though not necessarily false claims.

II-B.

The second threshold issue raised by PRC is that the above-mentioned claims were not referenced in the complaint with sufficient particularity. If plaintiff did not allege specifically that the invoices for $364,000 of related deliverables, the invoice for the accepted software, and the requests for equitable assessments were false claims, he arguably should not be able to base his cause of action on these requests. Plaintiff must also specifically allege that PRC made a representation that (a) were false; and (b) that resulted in a government disbursement to PRC. PRC adopts this position as a defense in its motion by arguing that the complaint does not properly allege the required elements and by relying on Rule 9(b) in its reply brief.

In general, claims of fraud must meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure: "the circumstances constituting fraud or mistake shall be stated with particularity." The government takes the position that 9(b) does not apply to allegations under the False Claims Act. In its amicus brief, the government notes that the FCA expressly states that "no proof of specific intent to defraud is required." 31 U.S.C. § 3729. The government concludes that a plaintiff suing under the FCA does not face the same bur-

den of proof as a plaintiff claiming fraud under the common law, and thus the particularity requirements for pleading common law fraud do not apply to the FCA.[2]

However, there is authority in this Circuit that a complaint under the False Claims Act must be particularized as required by Federal Rules Civil Procedure 9(b). *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982). The rationale of 9(b) is no less applicable when it is the federal government that is the alleged victim of the fraud. As the *Canon* court stated, "because 'fraud' encompasses a wide variety of activities, the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response." *Id.* at 1385. The *Canon* court also noted that "[t]he rule serves to discourage the initiation of suits brought solely for their nuisance value." *Id.* In addition, Rule 9(b) prevents plaintiffs from alleging fraud by hindsight.

The complaint does not identify specific requests for money. It refers to the series of software deliveries that were rejected and mentions that $600,000[3] was paid to PRC. The complaint does not mention that sixteen deliverables were "accepted," and the government received an invoice and

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[2] The Seventh Circuit held that 9(b) did not apply to a cause of action predicated on another federal statute (ERISA). *Thornton v. Evans*, 692 F.2d 1064, 1082 (7th Cir. 1982). The Sixth and Second Circuits have also held that 9(b) refers only to common law fraud. *Marsh v. Armada Corp.*, 533 F.2d 978, 983 n. 4 (6th Cir. 1976) *cert. denied*, 430 U.S. 954 (1977); *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 378 n. 8 (2d Cir. 1974) *cert. denied*, 421 U.S. 976 (1975).

[3] The parties later agreed that this amount was approximately $509,000.

made payment. Among the items invoiced and paid, but not referenced in the complaint, is the 3.15 software subsystem deliverable. However, this shipment was part of the series of software deliveries described in some detail in the complaint. Also, the total amount received by PRC was mentioned in the complaint and this amount included the $145,534 for the 3.15 deliverable. Plaintiff filed his complaint pro se, thus some leniency is in order. Therefore, PRC's Rule 9(b) argument will not defeat plaintiff's allegations surrounding the invoice and payment for the accepted software deliverables.

Plaintiff indirectly refers to the $364,000 of "related costs" in his complaint by mentioning the total amount of payments to PRC in the amount of $600,000. However, plaintiff does not itemize the costs or even describe the services or materials. Even under a lenient application of Rule 9(b), plaintiff has failed to properly allege a violation stemming from these requests.

Similarly, plaintiff does not make any reference to the equitable adjustment in his complaint.[4] PRC's motion to dismiss based on Rule 9(b) is granted in regard to the $364,000 of line items and the equitable adjustment requests. The only claim or request for funds on which plaintiff can base his cause of action is the invoice for the $145,534 for the accepted software.

In addition to identifying a claim, plaintiff also must allege that PRC knowingly made a false statement that resulted in the government's disbursement. The complaint alleges the

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[4] Plaintiff acknowledges that he did not allege that the equitable adjustments were false claims. In a footnote to his Memorandum he requested leave to amend, if necessary. Pl.'s Mem. at 7 n. 5.

circumstances of the statements and their falsity with sufficient specificity under 9(b), especially by the more lenient standard applied to a pro se plaintiff. ¶¶ 6-11, 14-15, 18-19, 22, 25, 26. Rule 9(b) expressly provides that knowledge and other states of mind may be averred generally. Thus, PRC's motion based on Rule 9(b) will be denied with respect to the invoice for the accepted software.

III.

In a suit under the False Claims Act, plaintiff must show a causal relationship between the false statement and the government's loss. *See, e.g., United States v. First Nat'l Bank*, 957 F.2d 1362 (7th Cir. 1992). In the instant case, plaintiff has the burden of showing that the alleged misrepresentations caused the government to make payments to PRC. However, it is undisputed that the government protected itself by compartmentalizing the Task Order and requiring testing of each element before obligating itself to make payment. Such a contract is an odd candidate for a False Claims Act suit. Initial representations by PRC of its capacity to perform and regular progress reports, whether optimistic salesmanship or misrepresentation, were not the immediate cause or impetus of the government's payment. Indeed, it was the government's own testing that resulted in "acceptance" and eventual payment. Plaintiff argues, that the government's sending an "Acceptance Form" to PRC does not mean that the government determined the product to be compliant. Nevertheless, that "Acceptance Form" followed a series of testing and triggered the invoicing procedure. This testing and acceptance is, in effect, an intervening cause that makes any prior representations immaterial.

Neither plaintiff, nor more important, the United States which has submitted a helpful brief amicus, has cited any False Claim Act case which sustained a complaint in which

the government compartmentalized performance and reserved and exercised the right to inspect and reject, segment by segment, the items tendered by a contractor. These critical, undisputed facts distinguish the case from other precedents and entitle PRC to a summary judgment.

The relationship between the alleged misrepresentations and payment for the other fifteen deliverables is also too tenuous to withstand summary judgment. Most of these items also required the government's acceptance prior to invoicing. Thus, even if plaintiff had specifically alleged fraud resulting in payment of approximately $364,000 for the related deliverables, he could not prove that the alleged misrepresentations proximately caused those disbursements. Therefore summary judgment must be granted in favor of defendant.

IV.

PRC seeks reimbursement for costs and attorneys fees on the theory that plaintiff's contentions are, in effect, frivolous. On the contrary, however, the issues here are not free from doubt, and PRC is not entitled to fee or cost reimbursement.

V.

The False Claims Act provides that "[a]n action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting." This provision has been interpreted to refer only to voluntary dismissals by a *qui tam* plaintiff. *See, e.g., Minotti v. Lensink*, 895 F.2d 100 (2d Cir. 1990). Accordingly, the accompanying Order grants PRC's dispositive motions and dismisses the complaint, while denying PRC's prayer for fees and costs.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 31st day of March, 1994, hereby

ORDERED: that defendant's motion based on plaintiff's failure to allege a false "claim" as defined by the False Claims Act should be, and is hereby, GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED: that defendant's motion to dismiss based on Rule 9(b) should be, and is hereby, GRANTED IN PART AND DENIED IN PART; and it is further

ORDERED: that defendant's motion for summary judgment should be, and is hereby, GRANTED; and it is further

ORDERED: that defendant's motion for attorneys' fees and costs should be, and is, hereby DENIED; and it is further

ORDERED: that the complaint should be, and is hereby, DISMISSED.

United States Court of Appeals
for the District of Columbia Circuit

No. 94-7091

September Term, 1994
USDC CV 92-1951

Filed Aug. 28, 1995

Mervyn A. Schwedt, ex rel United States of America,
Appellant,

v.

Planning Research Corporation, a Virginia Corporation,
Appellee

ORDER

Before: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel did not participate in this order.

United States Court of Appeals
for the District of Columbia Circuit

No. 94-7091

September Term, 1994
USDC CV 92-1951

Filed Aug. 28, 1995

Mervyn A. Schwedt, ex rel United States of America,
Appellant,

v.

Planning Research Corporation, a Virginia Corporation,
Appellee

Before: Edwards, Chief Judge; Wald and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed August 7, 1995, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

...TION FILED
DEC 28 1995

No. 95-829

(2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

PLANNING RESEARCH CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. MERVYN A. SCHWEDT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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December 1995

19 pp

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

No. 95-829

PLANNING RESEARCH CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA
ex rel. MERVYN A. SCHWEDT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Security Industrial Association (NSIA) respectfully moves for leave to file the attached brief as amicus curiae in support of petitioner in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to consent.

NSIA is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States.

The members of NSIA often enter into contracts to provide goods and services to government agencies.

The question in this case concerns the scope of the civil liability provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733 -- specifically, the circumstances under which a person may be liable for damages or penalties for making a false claim for payment by the government, 31 U.S.C. § 3729(a). In the course of performing their government contracts, NSIA's members must have frequent communication with government agencies and officials. The decision below effectively expands the scope of the Act to reach not only claims for payment but also many other communications that are not calculated to induce the government to part with money. That expansion threatens to increase significantly the burden that NSIA's members already suffer from unmeritorious lawsuits brought by *qui tam* relators who can act without government acquiescence. Accordingly, NSIA has a strong interest in having the erroneous decision below corrected, and we believe the Court would benefit from its views in this case.

Respectfully submitted,

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December 1995

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. The Filing of a False Claim is a Prerequisite to Civil Liability Under the False Claims Act 3

B. The Court of Appeals' Approach Eviscerates the Critical Requirement of the Filing of a False Claim and Conflicts with Decisions in Other Circuits by Allowing Civil Liability to Attach to False Statements Made to the Government that Have No Relation to a Demand for Payment 5

C. The Court of Appeals' Error Has a Broad and Deleterious Impact on False Claims Act Litigation that Warrants the Attention of This Court 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **Page**

Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355 (Fed. Cir. 1983) 9

Miller v. United States, 550 F.2d 17 (Ct. Cl. 1977) 8

United States v. Bornstein, 423 U.S. 303 (1976) 8

United States v. Ekelman & Assoc., Inc., 532 F.2d 545 (6th Cir. 1976) 9

United States v. Grannis, 172 F.2d 507 (4th Cir.), *cert. denied*, 337 U.S. 918 (1949) 8

United States v. McNinch, 356 U.S. 595 (1958) . . 4, 5, 8

United States v. Neifert-White, 390 U.S. 228 (1968) 5

United States v. Rivera, 55 F.3d 703 (1st Cir. 1995) 9

United States v. Tieger, 234 F.2d 589 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956) 4

United States v. Woodbury, 359 F.2d 370 (9th Cir. 1966) 8

TABLE OF AUTHORITIES--Continued

STATUTES **Page**

False Claims Act, 31 U.S.C. §§ 3729-3733 . . . . . 2, 3

31 U.S.C. § 3729(a)(1) 4

31 U.S.C. § 3729(a)(2) 4, 6

31 U.S.C. § 3729(c) 4

Program Fraud Act of 1986, 31 U.S.C. §§ 3801-3812 7

S. Rep. No. 212, 99th Cong., 1st Sess. (1985) 7

MISCELLANEOUS

False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 102d Cong., 1st Sess. 24 (1992) (Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice) 11-12

IN THE
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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR NATIONAL SECURITY INDUSTRIAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The National Security Industrial Association (NSIA) is a national organization of more than 300 manufacturing, research, and service companies from all segments of industry that provide goods and services in support of the national security needs of the United States. NSIA members annually

perform billions of dollars of work for government agencies pursuant to thousands of contracts.

Because much of their work involves government contracts, NSIA members are exposed to the possibility of suits initiated by private individuals pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733. Many of NSIA's members have already been defendants in such suits, which are frequently meritless. Even when the lawsuit has no merit, however, *qui tam* litigation is often extremely burdensome. Because the court of appeals' erroneous decision in this case greatly expands the circumstances that might allow an individual to draft a facially valid complaint initiating a *qui tam* action, the members of NSIA have a strong interest in the Court reviewing this case and confining *qui tam* actions within the limits established by Congress.

SUMMARY OF ARGUMENT

The decision below, by means of a creative and unacceptably broad definition of the term "claim," has expanded the reach of the civil liability provisions of the False Claims Act far beyond the limitations established by Congress. The text of the statute and the decisions of this Court clearly establish that civil liability under the Act attaches only to false statements associated with an immediate demand for payment by the government. Although the decision below pays lip service to that limitation, it effectively sidesteps it by holding that the requirement of a "claim" for payment here was satisfied by the mere fact that the defendant had the ultimate "goal of receiving payment" for its product. Pet. App. 7a.

Almost every government contractor has the ultimate goal of receiving payment for its performance. These contractors also are likely to have numerous communications with the government concerning their obligations under the contract. Thus, the court of appeals' decision greatly expands the scope of the False Claims Act by sweeping within the purview of its civil penalties a multitude of false statements that have nothing to do with demands for payment.

The effect of that erroneous expansion of the Act's coverage is magnified by two other factors: (1) the minimal threshold for "falsity" exemplified by the decision below, where the alleged misrepresentation was little more than a difference of opinion over whether the product complied with specifications (see Pet. App. 7a); and (2) the recognized tendency of many *qui tam* plaintiffs to initiate and pursue False Claims Act suits that the government regards as unmeritorious. Unless this Court acts to correct the lower court's misinterpretation of the Act, the courts can expect to experience an explosion of unwarranted *qui tam* lawsuits that will unnecessarily burden both the judiciary and unjustly accused defendants.

ARGUMENT

A. The Filing of a False Claim is a Prerequisite to Civil Liability Under the False Claims Act

The text of the False Claims Act, 31 U.S.C. §§ 3729-3733, is unambiguous in describing the circumstances that can give rise to civil liability. A person who knowingly presents to a government employee "a false or fraudulent *claim for payment* or approval" or who knowingly makes "a

false record or statement *to get a false or fraudulent claim paid* or approved by the Government" is liable for a civil penalty of up to $10,000. 31 U.S.C. § 3729(a)(1), (2) (emphasis added). The key requirement of a "claim" is specifically defined as "any request or demand . . . for money or property . . . if the United States Government provides any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

This definition reflects earlier decisions by this Court that made clear that civil False Claims Act liability does not attach without the filing of a false claim for payment. The leading case is *United States v. McNinch*, 356 U.S. 595 (1958), where the government sought to bring a False Claims Act suit against a defendant who allegedly had made false statements in an application to a bank for a loan that would be guaranteed by the Federal Housing Administration (FHA). This Court did not dispute that the alleged misconduct was reasonably viewed as a "kind of fraud practiced on the Government" (*id.* at 599) and that the fraudulent loan application could reasonably "be regarded as a claim, in that the applicant asserts a right or privilege to draw upon the government's credit" (*id.* at 598). Citing to the history and purposes of the False Claims Act, however, the Court ruled that the loan application was not the kind of "claim" that fell "within the scope that Congress intended the Act to have." *Id.* at 599.

Rather, the Court explained, Congress intended that the Act impose civil liability only when the "claim" is a kind of "demand for money." *Id.* at 599, quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956). Even though the false loan application set in

motion events that eventually could have led to the government paying money in the event of default, the application was not a "claim" within the meaning of the Act because it did not request that the FHA disburse funds or otherwise cause the FHA any "immediate financial detriment." 356 U.S. at 599.

The Court revisited this issue several years later in *United States v. Neifert-White*, 390 U.S. 228 (1968), where it reinforced the importance of whether the defendant has made a demand for payment. This time the Court found that there was False Claims Act liability for the defendant's false statements made in a loan application submitted to a federal agency. The Court explained that the crucial difference between that case and *McNinch* was that the loan request made directly to a federal agency triggered a disbursement of government funds and therefore was a form of a demand for payment by the government. Because *Neifert-White* "involve[d] a false statement made with the purpose and effect of inducing the Government immediately to part with money," it fit the definition of a "claim" that gives rise to civil liability under the Act. 390 U.S. at 232.

B. The Court of Appeals' Approach Eviscerates the Critical Requirement of the Filing of a False Claim and Conflicts with Decisions in Other Circuits by Allowing Civil Liability to Attach to False Statements Made to the Government that Have No Relation to a Demand for Payment

1. It is undisputed that the defendant in this case never demanded payment from the government for software that did not meet contract specifications. It submitted three

progress reports that allegedly falsely described the status of the project, and on four occasions it delivered software for testing. When the government rejected the software after testing as not meeting specifications, the defendant did not submit invoices or otherwise seek payment for the rejected software. *See* Pet. App. 3a-4a.

The court of appeals purported to recognize the fundamental rule that civil liability attaches only to the presentation of a false claim for payment. *Id.* at 6a. Noting that a "submission need not be an actual invoice to be a 'claim' or 'statement' under the Act," however, the court then proceeded to define "claim" so broadly as to eviscerate that fundamental rule. *Id.* The court stated that if the progress reports had falsely stated that the software was complete when in fact it did not yet meet specifications, then "these progress reports would constitute false statements in support of false claims and would trigger the Act's civil penalty." *Id.* The court acknowledged that the progress reports were not invoices seeking payment and that the defendant "did not submit a bill for the software." *Id.* at 7a. The failure to demand payment was immaterial, according to the court, because the defendant's "goal of receiving payment was implicit in the submission of the goods, and the accompanying progress reports had the purpose of 'get[ting] . . . [the] claim . . . approved.'" *Id.*, quoting 31 U.S.C. § 3729(a)(2).

Though obscured somewhat by its terseness, the effect of the court's reasoning undeniably is to allow false statements that are not associated with a demand for payment to give rise to civil liability under the Act. The court found that the complaint "state[d] a claim based on the three progress

reports," although those progress reports at most contained false statements but concededly did not seek payment. Pet. App. 7a. The court addressed the requirement of a "claim" for payment with its statement that the defendant ultimately had the "goal of receiving payment" for the submission of its goods. *Id.* But if that observation is sufficient to satisfy the requirement, then there is effectively no requirement at all. Virtually everyone who enters into a contract to provide goods or services to the government does so with the ultimate "goal of receiving payment."

Thus, the effect of the court's decision is to destroy the crucial distinction between a mere false statement and a false claim that is designed to induce the government to part with money immediately. That distinction is not only one recognized by the courts but also one that Congress has emphasized as significant. In considering the Program Fraud Act of 1986, 31 U.S.C. §§ 3801-3812, which was designed to extend liability like that under the False Claims Act to smaller claims, Congress noted that "under present law, there is no civil penalty for submitting a false statement, unrelated to a claim, to the government." S. Rep. No. 212, 99th Cong., 1st Sess. 18 (1985). Thus, in discussing the proposal that the Program Fraud Act contain a separate section that would establish liability for "[p]ersons knowingly submitting false statements, unrelated to a claim," the Senate Report acknowledged that the new statute would go beyond the limitations contained in the False Claims Act. *Id.* at 17.

Indeed, elsewhere in its opinion the court effectively acknowledges that its decision obliterates the key distinction between false statements and false claims for payment. Several cases have made clear that the Act allows for the

imposition of a distinct penalty for each false *claim* submitted, but not for each false *statement* submitted. *See, e.g., Miller v. United States*, 550 F.2d 17, 24 (Ct. Cl. 1977); *United States v. Woodbury*, 359 F.2d 370, 377-78 (9th Cir. 1966), *United States v. Grannis*, 172 F.2d 507, 515-16 (4th Cir.), *cert. denied*, 337 U.S. 918 (1949). In *United States v. Bornstein*, 423 U.S. 303 (1976), this Court expressed its approval of this line of cases, noting that they were "in accord with this Court's statement that 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'" *Id.* at 309 n.4, quoting *United States v. McNinch*, 356 U.S. at 599.

This rule would appear to pose a practical problem for calculating potential penalties in this case because the "claim" relied upon by the court of appeals -- the ultimate goal of receiving payment -- is too inchoate to count as an event that triggers an individual penalty assessment. The court of appeals dealt with this problem by simply ignoring the distinction between false claims and false statements, observing that "[e]ach individual false claim or statement triggers the statute's civil penalty." Pet. App. 6a, citing *Bornstein*, 423 U.S. at 313. That incorrect assertion allowed the court of appeals to agree with the plaintiff that each of the three progress reports gives rise to a separate penalty, even though the progress reports are not claims for payment but at most are false statements. *See* Pet. App. 8a. In so doing, the court of appeals subtly expanded the reach of the Act in a manner that has tremendous significance for False Claims Act litigation.

2. The decision of the court below is irreconcilable with decisions in other circuits. Other courts of appeals have

routinely and uniformly rejected False Claims Act liability for false statements not associated with a false claim, even though the defendant had the ultimate goal of inducing the government to pay out money.

Brunswick Bank & Trust Co. v. United States, 707 F.2d 1355 (Fed. Cir. 1983), is illustrative. In that case, a bank issued a construction loan and then misrepresented to a federal agency that all construction and acquisition had been completed on the project, which was a certification needed before the agency would enter into a contract to guarantee the loan. *Id.* at 1364 & n.12. The court ruled that this misrepresentation was not an actionable false "claim" under the Act because it did not "in any way affect[] the bank's contractual and legal right to reimbursement under the contract of guaranty." *Id.* at 1365. The court emphasized that "[i]n order to determine whether a false claim for payment has been presented upon the United States, a court must focus on the actual claim for reimbursement under the guaranty contract." *Id.* at 1365 n.13. Plainly, this approach would not allow for imposition of False Claims Act liability in circumstances like those presented here. *See also United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995) ("the statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'"); *United States v. Ekelman & Assoc., Inc.*, 532 F.2d 545, 552 (6th Cir. 1976) (statute of limitations does not begin to run until the defendant "presents a claim to the VA or FHA for payment on the guaranty or insurance").

C. The Court of Appeals' Error Has a Broad and Deleterious Impact on False Claims Act Litigation that Warrants the Attention of This Court

The potential mischief wrought by the court of appeals' decision is enormous. A contractor can be expected to have countless communications with government officials in the course of performing its obligations under the typical government contract. According to the decision below, each one of these communications has the potential for triggering a False Claims Act suit, even if it is unrelated to a claim for payment. Indeed, even if the contractor *never* makes any claim for payment, it can be exposed to False Claims Act liability so long as the goal of its efforts at performance was to obtain payment for goods or services.

Moreover, this case demonstrates how flimsy the allegations of falsity can be and still be regarded by a court as sufficient to support a cause of action under the Act. The defendant submitted a series of progress reports containing a table reflecting how close it was to completion of various tasks. The progress reports listed certain software development as 100 percent completed when the software was ready for submission to the government. The court of appeals ruled that, when the product failed government testing, the plaintiff was entitled to file suit on the ground that the defendant "'present[ed] and cause[d] to be presented non-functional and non-compliant software to representatives of the United States while wrongfully and knowingly misrepresenting that said software was compliant and functional.'" Pet. App. 6a, quoting Complaint ¶ 25.

To the court, it was not material that the defendant responded to the government's failure to accept the software in the way that most customers would want their supplier to respond; the defendant went back to work on improving the software and *did not attempt to seek payment* for the rejected product. In other words, under the decision below a contractor may expose itself to False Claims Act liability whenever it has a difference of opinion with the government over the quality of its product -- even if the contractor accedes to the government's opinion and determines not to seek payment for a product that has been rejected as unsatisfactory.

This decision thus opens the door to a tremendous expansion of False Claims Act litigation beyond the limits established by Congress. Because of the *qui tam* provisions of the Act, there is no reason to hope that prosecutorial discretion will prevent this potential expansion from becoming a reality. Experience under the Act shows that its *qui tam* provisions lead to private lawsuits in many instances where there has not truly been an attempt to defraud the government and where the government itself would not regard the circumstances as appropriate for seeking civil liability. Even under the Act as properly construed, the Justice Department has complained to Congress about the abuse of the *qui tam* provisions by private citizens who are more interested in fortune hunting than in penalizing actual efforts to defraud the government. The Assistant Attorney General of the Civil Division testified in 1992 that many *qui tam* suits are "frivolous," presenting "no evidence, no information based on personal knowledge, or are 'kitchen sink' complaints containing every conceivable broad allegation without any specific evidence whatsoever." *False*

Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 102d Cong., 1st Sess. 24 (1992) (Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Dept. of Justice).

The government declines to appear in most of the *qui tam* cases that it investigates (*id.* at 25), including this one, but that government judgment that the case is unmeritorious does not prevent the suit from proceeding. The result is much litigation that, even though the suit ultimately will be dismissed, is unnecessarily burdensome to the judicial system and the defendants who are unjustly accused. The court of appeals' expansive and erroneous redefinition of the circumstances that can give rise to civil liability under the Act will further exacerbate this problem by allowing a potential *qui tam* plaintiff to cobble together a facially valid complaint in connection with almost any government contract, regardless of whether the contractor has attempted to obtain payment from the government by fraud.

Finally, even for those cases where a contractor is legitimately subject to liability under the Act because it has submitted a false claim for payment, the decision of the court of appeals establishes a rule that destroys the fabric of the Act's penalty provisions. In determining the penalty that attaches to a False Claims Act violation, Congress was aware that each separate false claim would be actionable as a separate violation. It did not contemplate, however, that each individual communication between the contractor and the government, such as a progress table routinely included in periodic progress reports, could give rise to a separate

penalty. An approach that treats every single false statement as a separate violation may transform even relatively minor cases, where little or no actual damage occurs, into ones involving hundreds of thousands or millions of dollars in potential penalties.

For all of these reasons, this Court should not let the decision below stand. Rather, it should grant certiorari and reverse the court of appeals in order to restore uniform application of the False Claims Act's rule that civil liability does not attach to false statements alone, but rather only when a false claim for immediate payment is filed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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